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NO. 80-1765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AMERICAN SOCIETY OF MECHANICAL ENGINEERS,
Petitioner
v.
HYDROLEVEL CORPORATION,
Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE IN SUPPORT OF RESPONDENT, HYDROLEVEL CORPORATION

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LAW REPRINTS EDITOR'S NOTE: THE MOTION OF STEPHEN G. GLATZER, ET AL. FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE WAS DENIED BY THE COURT ON NOVEMBER 9, 1981, AND IS INCLUDED HERE IN THE INTEREST OF COMPLETENESS.

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MOTION OF STEPHEN G. GLATZER
AND
EMERGENCY BEACON CORPORATION
FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Rule 36.3 of the rules of this Court Stephen G. Glatzer and Emergency Beacon Corporation respectfully move the Court for leave to file a brief Amicus Curiae in the above entitled case. This brief is submitted in support of the respondent, Hydrolevel Corporation. Counsel for petitioner American Society of Mechanical Engineers, Harold R. Tyler, Jr., denied

movant's request for consent.

INTEREST OF AMICUS CURIAE

1. Stephen G. Glatzer is president of Emergency Beacon Corporation, (hereinafter EBC). EBC has had and is having problems with a voluntary standards group, the Radio Technical Commission on Aeronautics, (hereinafter RTCA) which have similar problems to those of Hydrolevel with the American Society of Mechanical Engineers, Inc., (hereinafter ASME). Glatzer testified before the Federal Trade Commission and was cross examined by Mr. William Rockwell of ANSI (See Appendix P . A-11 and A-12) who has submitted an Amicus Curiae brief in the instant matter. In his testimony before the Federal Trade Commission, (hereinafter FTC), in its inquiry on "Proposed Trade Regulation Rule: Standards and Certification", Glatzer offered the unique viewpoint of a member of a

voluntary standards organization who is also the president of a small high-technology corporation that was in danger of having its major product classified as not meeting the standards promulgated by RTCA. The testimony of Glatzer before the FTC and the light that it cast upon the potential misuse of the apparent authority of RTCA as a result of the lack of due process and appeals mechanisms available, caused RTCA to take a more reasonable position. Recently, however, the new Congress made it clear to the FTC that it should not attempt to regulate the voluntary standards and certification organizations such as RTCA and ASME. Small high-technology companies, such as Emergency Beacon Corporation, must now look to a private antitrust action against the standards organizations as their only means of redress. Fortunately, the

Hydrolevel decision of the Second Circuit Court of Appeals, articulates the mechanism for judicial redress of abuses that take place in standards and code-setting organizations as the new Congress apparently intended. Should this Honorable Court affirm the Second Circuit panel the precedent established with regard to apparent authority and negligent liability, will in your movant's opinion, suffice to protect the interests of the many businesses and corporations who strive to introduce technologically superior and often economically more attractive products to the market. On the other hand, should this Court reverse and adopt the position espoused by ASME and the multiple amici curiae briefs of the standards organizations, thereby effectively granting them the immunity they pray for, the sole remaining check on the absolute power of the

private standards groups will be nullified to the eventual destruction of Emergency Beacon Corporation and countless other small companies in similar circumstances that form the innovative roots of the free enterprise system. This was certainly not the intent of Congress when they suggested substituting private antitrust actions for FTC regulations.

DESIRABILITY OF AN AMICUS CURIAE BRIEF

2. The instant brief is desirable because unlike the briefs of the petitioner and respondent and the other amici curiae that have been submitted on behalf of the respondent, your movant is an active member of and participant in a private voluntary standards group and fully appreciates the need for such groups, the difficulty of obtaining volunteers to serve thereon and the dynamics that exist in the group. Most importantly, your movant is also a small corporation

whose very existence has been threatened by abuses that occurred within said standards group, and, therefore, is in the unique position of seeing both sides of the issue. The annexed brief will show that the Second Circuit's decision will in fact not create a hardship for the voluntary private standards groups and would, on the other hand, encourage them to more closely fulfill the function for which they were designed. We would hope to show the Court that the private standards groups as they now exist are not pristine pure public-spirited bodies as has been claimed by ASME and the other standards groups, but have elements that are thinly veiled cartel-like arrangements which tend to exclude competitors from selling their products for particular uses in particular markets. We will further show that under

the Second Circuit standard of "negligent liability", the probability of a standards group being manipulated by certain of its members would decrease substantially without significant ill effects on the groups themselves. Indeed, one of the practical factors not discussed in the briefs that your movant has examined, is the universal maxim in the business world that nothing is free and the "free" services of the multitude of "volunteers" who populate these organizations are not truly free, but are donated with the expectation that the standards and codes that will be promulgated by said organizations will, at best, benefit the corporate sponsors of the "volunteers" or at the very least, prevent their corporate interests from being harmed.

CONCLUSION

Stephen G. Glatzer has examined

the arguments made in the courts below and his amicus curiae brief does not duplicate the case law which has been presented or that Hydrolevel may be expected to offer. His brief, instead, addresses the problems associated with private standards groups and the small companies that are often the victims of said groups in an antitrust sense. The arguments presented in the annexed brief will not be argued elsewhere as they are argued here.

Stephen G. Glatzer has twice appeared and argued before the United States Court of Appeals for the Second Circuit and has litigated five times before the United States District Court for the Southern District of New York. Although these proceedings were related to the welfare of Emergency Beacon Corporation, they are unrelated to the matters presently at bar. Indeed should

this Court grant the instant motion, Stephen G. Glatzer will be available for questioning on the positions espoused in his brief and answer any inquiry that the Court may put to him. Although not licensed to practice law Glatzer has carried out the "legal" activities enumerated above and has written this brief and motion. During oral argument before the Second Circuit, Glatzer informed the presiding judge of the panel, Judge Oakes, that he was not an attorney. The judge commented, "You wouldn't be aware of it from your arguing ability"; and although this Court may not usually look favorably upon an amicus curiae brief presented by a pro se, in order not to foreclose considerations of a viewpoint that might be helpful to the Court I have asked Harvey S. Barr, Esq., a member of the bar of

the Supreme Court of the United States, to endorse this brief and, if required, adopt it as his own and/or be the attorney of record. Mr. Barr's affidavit is annexed hereto. For all of these reasons Stephen G. Glatzer and Emergency Beacon Corporation request that their motion for leave to file the annexed amicus curiae brief be granted.

Respectfully submitted,

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Amicus Curiae

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AFFIDAVIT

STATE OF NEW YORK)
) ss:
COUNTY OF WESTCHESTER)

Harvey S. Barr, Esq., being duly sworn and deposed states:

(1) I am an attorney duly admitted to practice before the Supreme Court of the United States.

(2) I am the trustee-in-possession of Emergency Beacon Corporation, said corporation currently being under the protection of Chapter XI of the Rehabilitation Act.

(3) Further, under the leadership of Mr. Glatzer the corporation has successfully proposed and had accepted by a majority (in amount and number) of the creditors, a plan of arrangement.

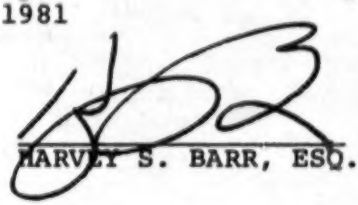
(4) For the past five years I have worked closely with Mr. Glatzer in numerous litigations that have stemmed out of the financial problems of this small but technologically innovative and advanced company. I am familiar with the company's dealings with RTCA, the negative effect certain proposed standards would have on the economic viability of the company, Mr. Glatzer's efforts both as a member of that standards group and as president of Emergency Beacon Corporation, and his testimony on standards and regulatory groups that was given before the Federal Trade Commission.

(5) Further, I have read this motion for the amicus curiae brief and the amicus

curiae brief as well as the applicable papers from the courts below. If this Honorable Court is not disposed to accept Mr. Glatzer's motion for leave to file an amicus curiae brief and the annexed brief and appendix, I willingly and gladly adopt it as if it were my own and will become attorney of record, with respect thereto, for I feel that the viewpoints espoused in the brief should be considered by the Court and the Court's disposition of the Hydrolevel appeal will be a critical factor concerning the survivability of the Emergency Beacon Corporation as well as countless other companies that could be hurt or perhaps forced to go the way of Hydrolevel if there is no mechanism for accountability by the powerful standards organizations that

with one stroke of the pen can "destan-dardize" a company out of existence.

Dated: Spring Valley, NY
October 8, 1981



HARVEY S. BARR, ESQ.

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BRIEF OF AMICUS CURIAE, STEPHEN G. GLAZER AND EMERGENCY BEACON CORPORATION

INTEREST OF AMICUS CURIAE

Amicus curiae adopts the statements in paragraphs 1 and 2 of the Motion for Leave to File Amicus Curiae Brief preceding this brief, as showing the interest of amicus curiae.

STATEMENT OF THE CASE

The instant case is one where a standards group allegedly used its power to harm and eventually destroy a small technologically advanced corporation. In the instant case Hydrolevel has alleged

that inaccurate statements made public under the apparent authority of ASME were accepted as gospel by Hydrolevel's potential customers. Relying on said statements the customers ceased to be interested in purchasing Hydrolevel's only product and Hydrolevel was forced out of business.

It is the purpose of this brief to explain what actually happens in standards organizations, in terms of the power these organizations can and do exert in the marketplace, the constant battle among the "voluntary" members of the organization to secure an advantageous position for their sponsor and the effort made by the standards organization to be responsible in the use of its name, prestige and power. It will also attempt to examine the impact of this Court's impending decision in the Hydrolevel appeal. From this posture it

matters little whether the accusations levelled by Hydrolevel against ASME are true or not. What does matter, and what is of tantamount importance to the multitude of small companies and volunteers to standards organizations is the precedent that has been set by the panel of the Second Circuit Court of Appeals and the precedent that will be set by this Honorable Court when it renders its decision.

For purposes of the brief, I assume arguendo that Hydrolevel was damaged by the letter that was written and disseminated on behalf of ASME by Hoyt and instigated by James and Hardin. With these assumptions, we have a situation where there was a dominant manufacturer and supplier in an industry, M&M. A threat was observed to M&M's dominance of the market by a technologically advanced product made by a small company,

Hydrolevel. Aware of the threat, various members of the large company and its allies used the standards group to effectively remove Hydrolevel from the marketplace.

SUMMARY OF ARGUMENT

There is an almost symbiotic relationship between associations such as ASME that set standards and promulgate codes and the manufacturers and marketers affected thereby, such as M&M and Hartford Insurance, (who in reality pay for or otherwise compensate ASME's "volunteer" staff). ASME should be held liable for injury caused to Hydrolevel by the staff volunteers' action, as the Second Circuit decided, for otherwise there will be little or no motivation for the standards associations to monitor and control the awesome power that they possess. Indeed, should the decision of the Second Circuit Court of Appeals be reversed on the theory

espoused by ASME, the resulting immunity would encourage blatant abuse of the power of these standards organizations to oppress competition by small highly-motivated innovative companies, the backbone of the free enterprise system. The result would be a loss of that innovation and creativity that is the root of this country's long-term technological superiority in the world. Therefore, regardless of this Court's opinion of the precise merits of Hydrolevel's damages and ASME's liabilities, it is of tantamount importance that small companies like Hydrolevel not be left totally without recourse against the standards organizations, notwithstanding Congress's direction that the Federal Trade Commission abstain from interfering with said organizations.

ARGUMENT

POINT I

BECAUSE OF THE ALMOST SYMBIOTIC RELATIONSHIP BETWEEN ASME AND THE MANUFACTURERS SUCH AS M&M, WHO IN REALITY COMPENSATE ASME'S "VOLUNTEER" STAFF, ASME SHOULD BE HELD LIABLE FOR THE INJURY CAUSED HYDROLEVEL BY THE VOLUNTEERS' ACTIONS UNDER THE THEORY OF NEGLIGENT LIABILITY IN PERMITTING ITS APPARENT AUTHORITY TO BE ABUSED, AS HELD BY THE SECOND CIRCUIT

ASME's argument before this Court as reflected in its brief, turns on the proposition that ASME the organization cannot be held liable for the injury caused by the actions of individuals Hardin and James. Both men, ASME contends although apparently functioning within their roles as chairman and vice-chairman, respectively, of ASME's Heating and Boiler's Subcommittee, were in reality serving only the interests of M&M, James's true employer. Arguing from the Restatement (Second) of Agency, ASME contends

that for it to be liable, James must have been acting on its behalf and cites several cases espousing this theory. ASME's argument concludes with the observation that Hydrolevel is unable to show that James's or Hardin's conspiratorial activity was intended to benefit ASME.

As an active member of RTCA, a similar standards organization, I suggest that ASME's conclusion is wrong. ASME may not have received benefits per se from the activities of James and Hardin, but that is not the issue. These men were not engaging in isolated machinations. As mentioned before, I am a member of a volunteer standard setting organization, RTCA, and the president of a corporation, EBC, that must compensate the volunteers that I send to work at RTCA. I am fully aware, therefore, as are virtually all other active

members of standards organizations, that the volunteer staff constantly attempts to utilize the organization to either protect or advance the economic interest of their "true" employers. The standards organization (and ASME is certainly no exception) condones such actions to guarantee a flow of "volunteer" labor. Accordingly, the benefit ASME received, although somewhat intangible, is a benefit it sorely needs and it must, therefore, be held liable for the injury caused by volunteer staff acting under its authority. The intangible benefit is the good will of those manufacturers and marketers that it requires to survive. The power of ASME and associations like it is predicated upon its standards and code writing activites. These activities regulate the manufacture and distribution of products to a far greater extent than even the rules promulgated by governmental bodies. However, this power is

fueled by the labor of many individuals. It obviously requires an extremely large staff of expert engineers and others to adopt and revise the approximately four hundred codes and standards which are the responsibility of an organization such as ASME.

ASME could obviously not afford to hire the necessary staff to accomplish this task. It is, indeed, dependent upon the largess of the private manufacturers and marketers that it "regulates." RTCA and all the other standards organizations are no exception. They all have stated in great detail how without a huge number of highly paid volunteers it would be impossible to regulate and promulgate the various codes and standards that are necessary to make their subject products safe, fit together, and perform as expected in this complex technological

society we live in. Such complete dependence on the free services of the manufacturing and marketing members of the organization unfortunately creates an unholy alliance of interest. Private industry, the manufacturers and marketers are willing to subsidize their employees to work in ASME and other standards organizations if, and only if, it will advance their own economic interests. Indeed, considering the huge sums of money that must be spent to subsidize the volunteers, it may well be considered corporate waste and a breach of the fiduciary relationship between the officers and directors of a corporation and its stockholders if the former would authorize payment of salary and expenses to employees engaged in ASME or other standards organizations businesses if a benefit did not inure to the corporation. I believe this Court can take judicial notice that most stockholders prefer

receiving dividends to the moral reward of knowing that their corporation was a contributor to the public good.

Stated more specifically, an employee who "volunteers" will be able to participate in writing the codes and standards to advance the economic interests of the employee's actual employer at the expense of the employer's competition. Unfortunately, this is the lure that the standards organizations use to bolster their staff. I am only asking that in return the organizations retain responsibility for their actions.

The employee who "volunteers" to aid the standards groups in writing and revising the code gladly accepts the assignment knowing full well that by participating in and by gaining influence in an organization such as ASME he will increase his value to his employer and will advance up the cor-

porate ladder. In the instant case James, for example, received a salary of only $20,000.00 per annum from M&M during the year 1971 and yet he received bonus payments of more than $60,000.00 in 1971, a sum triple his salary, (HX V. 82) (P.8, Hydrolevel's Brief to the Second Circuit Court of Appeals) as a result of the value that M&M placed on his ability to influence ASME's activities affe ing M&M's interests. The 1973 M&M memorandum HX V. 61-63) synopsized on page 9 of Hydrolevel's brief to the Second Circuit Court of Appeals amply demonstrates this principle:

> "A major reason for the continued success of M&M is a result of (James's) efforts and skill in influencing the various code making bodies to 'legislate' in favor of M&M products. This has been a planned strategy for the business under E. N. McDonnell and carried out with considerable success as evidenced by the M&M market penetration of 70 plus %...

> It is of vital importance to M&M to maintain the continuity of John's influence as above.... In this circumstance his seniority is a distinct plus for both experience and influence."

Thus in this case, as in the case of the countless other standards organizations for which this amicus curiae speaks, a community of interest is created between ASME and its "volunteer" staff, and the manufacturers and marketers who employ and subsidize the agency's volunteers. This alliance is not unique but is a natural consequence of a system where a regulator is dependent upon those it regulates to compensate the staff which it needs to develop the regulations. What James and Hardin did was perhaps more blatant than the average method but was nonetheless standard operating procedure in standards writing organizations such as ASME.

As an example, very often a code writing committee in a standards organization will adopt a standard which is, in fact, a particular characteristic of one specific product. This standardization obviously gives the established company a competitive advantage over a possible newcomer. As an example, at the last meeting of the RTCA committee on emergency beacons, of which I am an active member, a new test was proposed to measure the survivability of an "emergency beacon." This is a device that is mandated to be carried on most aircraft, pursuant to the OSHA law enacted by Congress. The beacon is basically an automatic SOS transmitter which is designed to survive a crash and emit a signal to aid search and rescue teams. In this particular instance, I stated at the

meeting that the survival test that was being proposed was overly severe and not realistic or representative of forces that had been observed in any of the many, many documented crashes that I and other members of the committee had seen. Almost instantly most members of the committee turned on me and said: "Why are you objecting? Your product meets this test." This illustrates the fact that the standards committees have taken as an intrinsic operating principle that they should not promulgate any standard that their active member's products will not meet. Additionally, the Court's attention is directed to the amicus curiae brief of the Legal Foundation of America who, on page 8, accurately suggests that the natural tendency of professions is, and I believe should be, to set standards accommodating the lowest

safe common denominators and that this tendency would be encouraged by the Court of Appeal's opinion, should it be sustained.

In the current case the purpose of the low water cut-off valve was simply to prevent the dry fire type accident explosion and, as such, any device that functioned reliably in that regard should be acceptable whether the consumer opts to be penny-wise and pound foolish, such as by purchasing the lowest quality device that meets the standard and requires replacement at frequent intervals, or whether he opts to buy the most expensive, super deluxe unit that will last, not only the lifetime of his boiler but the lifetime of his children and their children. It is the consumer's right to make that decision. If the standards organization forces the consumer to buy something that is above and beyond his re-

quirement and above and beyond the requirements of safety, then the standards organization has ceased to be a standards organization and has become an organization that not only seeks to restrain trade but seeks to deprive the consumer from having a full and effective choice in the marketplace, and is merely a tool of the established companies.

It is important, at this point, to examine the composition of the very specialized groups that write codes. Invariably they are dominated by representatives of the manufacturers of the various types of products and in many instances also by agencies that are concerned with the regulations such as insurance companies, entities responsible for building codes, etc. People who have highly specialized knowledge of a particular narrow field are essential to the drafting of meaning-

ful and effective codes in those specialty areas. But the very fact that they have this unique insight into a narrow area of technology also makes them quite conversant with the ramifications of their decision. From my experience I can state that it is more likely than not that when the committee members of ASME were discussing the time delay that they knew precisely that the time delay was a characteristic unique to Hydrolevel's probe and not at all applicable to the M&M float valve. In an analogous situation where the RTCA committee originally decided that a feature of our emergency beacon, that of an internal antenna, was inferior there was no question in anyone's mind as to what company used the internal antenna and what companies used the external antenna, the established approach. Indeed, as the testimony that I gave before the Federal Trade Commission in docket 215-61 Proposed Trade

Regulation Rules Standards and Certification on Tuesday, September 11, 1979, between pages 10431 and 10463, indicates,initially the committee used such arguments as "it is intuitively obvious that the internal antenna will not work as well as the external antenna." Due to the pressure exerted by my mere testimony before the Federal Trade Commission and my active participation on the Committee, it was resolved that the question be solved, not by speculation, but rather by examining systematically the history of crashes and failure reports and that measurements be conducted by a governmental agency, NASA. The end result was that the crash data indicated that there was not one single instance documented of a failure of the internal antenna unique to our product and that approximately 11% of the documented failures of <u>other</u> manufacturer's

products was due to a failure of the external antenna or the coaxial cable necessarily connecting to it due to the forces of a crash. Similarly detailed studies conducted by NASA indicated that the signal transmission capability of our internal antenna and the more widely used external antenna in a crash situation were comparable. If the precedent established in the instant case by the Second Circuit is allowed to stand by this Court, the RTCA would be more careful in the future before ruling out the use of a product without proper evidence and testing. RTCA, who would now be responsible,would monitor the "volunteers" who were employed by companies that made emergency beacons with external antennas with heightened concern knowing that without any scientific evidence on which to base a proposed rule rejecting the internal antenna and with full knowledge that the rule was being proposed solely to

strengthen the competitive position of the external antenna beacon manufacturers to the detriment of EBC, would not move so hastily to promulgate the restrictive rule without valid scientific evidence if they could be found negligently liable. On the other hand, should this Court reverse the Second Circuit, thereby immunizing standards organizations, what motivation would the members of the standards committee have to ever consider the anti-competitive effect of what they were doing? With virtual immunity, why should they otherwise be motivated to do other than promote the economic interest of their employers, notwithstanding the fact that in order to achieve this they might have to compromise their true purpose of establishing safe and fair standards in order to satisfy those manufacturers with the most

financial clout.

Notwithstanding all of the above logic ASME attempts to picture itself as a public service, not-for-profit association who has been betrayed by a few members of its volunteer staff. In fact, as unfortunately every standards organization including ASME is well aware, public service is but a veneer, and stripping it away reveals that ASME, as are many of the other organizations, is used as a tool to whatever extent possible by the large corporations who subsidize its volunteers, and are often able to offer employment to governmental and insurance company committee representatives when they retire. The manufacturers' and marketers' interest usually predominates. ASME and the other standards organizations benefit by involvement in the system. They are able to survive. They are also able to maintain their power. However, power carries with it responsibilities

and accordingly ASME should be held liable for the injury caused Hydrolevel by James and Hardin through the use of their status of chairman and vice-chairman of the ASME Boiler Safety Committee. It is axiomatic that if James stood up on a large soap box and proclaimed to the world that the Hydrolevel device was inferior and only his float level device was safe, the world would take that with a grain of salt. But when such a statement can be made behind the deceptive and protective veneer of a standards organization that represents itself as unbiased and solely interested in the public safety, such a statement derives a potency sufficient to destroy a competitive corporation as it did in the instant case to respondent Hydrolevel.

Petitioner, ASME, and its supporters are fond of quoting De Tocqueville as

authority for the positive and particularly American character of voluntary associations.

However, De Tocqueville, unlike petitioner, astutely distinguished between voluntary associations of feeble but independent individuals and a voluntary association composed of several powerful partners, each supplying a retinue of retainers. It is the former association which De Tocqueville denominated as being indigenous to a democratic society and particularly American. The latter type of association he described as native to aristocratic society. See De Tocqueville Democracy in America (Mentor Books, 1956), pp. 198-200, Appendix, p. A-13-22.

Which type of association is ASME? This amicus curiae believes in the Hydrolevel situation and in other similar abuses that the petitioner (and other

standards and certification organizations) can be dominated by a few powerful marketers and manufacturers. These aristocrats, by subsidizing their retainers' (employees') voluntary service tend to dominate the association. ASME in the instant matter is the perversion rather than the embodiment of the American ideal.

POINT II

THE AMICI CURIAE BRIEFS THAT HAVE BEEN SUBMITTED BOTH IN THE WRIT FOR CERTIORARI AND ON THE INSTANT APPEAL PRIMARILY COME FROM STANDARDS ORGANIZATIONS BUT ARE NOT NECESSARILY REFLECTIVE OF THE VIEWPOINT OF MEMBERS OF SAID ORGANIZATIONS

As I have indicated in my brief, my viewpoint as a member of a standards organization is somewhat different than the viewpoint of the administration of the organization. An editorial in the September 16th issue of EDN, an approximately 200-page bi-weekly magazine with

a controlled subscription that is sent primarily to working engineers in the electronics field many of whom are members of IEEE, (one of the amici curiae who submitted a brief to the Court).

The editorial by Roy Forsberg, the editorial director, reproduced and attached hereto (A-23-27) speaks to the issue that the IEEE amicus curiae brief does not necessarily represent the feelings of the members of the IEEE and in representing that viewpoint suggests that if a society accepts the responsibility of setting industry standards and/or regulations it must be willing to be held accountable for its actions and the actions of its members it appoints to key committees. It urges that IEEE withdraw its amicus curiae brief. The editorial obviously rings true to many of the principles I have espoused in my brief and additionally might point out that at one

time I and the now vice-president of Emergency Beacon Corporation were members of IEEE. We both, long ago, let our memberships lapse, for essentially the reason that we never felt that the organization was truly responsive to our needs as working engineers.

POINT III

HOLDING THE INDIVIDUAL VOLUNTEERS OR THEIR TRUE EMPLOYERS LIABLE FOR ABUSES SUCH AS WERE PERPETRATED ON HYDROLEVEL WOULD NOT PROVIDE EFFECTIVE REDRESS TO THE VICTIM

The loopholes and fraudulent schemes that could be perpetrated to misuse the power of the standards groups such as ASME are endless, and justice can only be done by pinning the responsibility on the ultimate holder of power which is the standards organization. If indeed the organization has the expertise

to write knowledgeable effective standards, such as the ASME brief and the numerous amici curiae briefs from the other standards organizations claim, that knowledge and ability is also capable of safeguarding against abuses of the type that is alleged that ASME, M&M and Hartford perpetrated on Hydrolevel. The key proposition that has been overlooked in the briefs that I have seen below, is the attitude of the innocent volunteer, and speaking as one, I know that I would be much more concerned about my volunteer work in RTCA if I felt that an innocent slip on my part could make me or my company liable for a suit that could wipe us out. I alone, as is the case with most volunteers, do not always have enough of the complete picture to be absolutely sure that what I propose is immune from any damaging antitrust effect on competitors that I may not be personally aware of.

However, this is not the case when we deal, not with the individual volunteers that ASME and its proponents would make liable, but the committees as a whole whose collective wisdom often incorporates the total sum of wisdom in the specialized narrow area for which the committee seeks to regulate and promulgate standards. The answer is not to make the volunteers personally liable. The answer is not to eliminate private standards organizations and saddle the government with the burden of regulation. I think it is the spirit of the times and certainly the present Congress has espoused the fact that it would like to see government get out of the regulation business as much as possible. Therefore, the only effective safeguard is to make the people who promulgate the regulations liable

for misuse of their power. Again, by pinning the responsibilities on the volunteers, it will become a self-fulfilling prophecy that nobody will want to volunteer.

If the liability would go to the volunteer, or the volunteer's actual employer nothing would prevent fraudulent schemes from rendering those entities judgment-proof.

The following is an example of a judgment-proof situation, where either the individual volunteer or his employer would be liable. If it were common knowledge that employers were liable in this regard, it would be easy to set up paper corporations for the purpose of "employing" the individuals who would be the volunteers working for the standards organizations, even though their <u>true</u> employer would be the major company whose interests the volunteer is representing.

The paper corporation would have little or no assets, and the volunteer could easily have his finances arranged to be effectively judgment-proof. Since in our example the standards organization (which would be the case if this Court reverses the Second Circuit) is not liable, the end result is that the small aggrieved company whose products are improperly closed out of the market by the standards organizations, has no effective recourse, even if it acquires a judgment in an antitrust action. I am sure that as the dollars increased more talented minds would be able to create more complex methodologies and scenarios. Suffice to say the standards generator has the power to abuse and must also have the liability for the abuse.

Assuming arguendo the danger of judgment-proof volunteers and actual

employers and assuming arguendo the Court reverses the Second Circuit's theories of liability to the standards organization, the sole remaining check upon the power of the code and standards organizations such as ASME would thereby be removed. For even despite the testimony elicited during the hearings before the subcommittee on antitrust and monopoly of the Senate Committee on the Judiciary in 1976 on voluntary industrial standards, legislation regulating associations such as ASME was not enacted. Notwithstanding further testimony before the Federal Trade Commission (see Standards and Certification Proposed Rule and Staff Report, Bureau of Consumer Protection, December 1978) a proposed rule imposing due process requirements on code and standards organizations such as ASME did not come about. The reason it didn't was twofold. One, due to an intense lobbying effort by the so-

called public spirited code and standards association such as ASME, the proposed regulator, the Federal Trade Commission, was almost abolished. Secondly, it appears to be common wisdom that the Federal Trade Commission is alive today only because it voluntarily backed off from most of its targets and programs, including jurisdiction over the code and standards associations such as ASME. Congress, however, attempted to fill the vacuum by suggesting that private antitrust litigation would be the mechanism for redress of abuses. Should the Second Circuit's decision here be affirmed by this Honorable Court it will serve to deter the code and standards associations, such as ASME, from the naked exercise of their power on behalf of those large manufacturers and marketers which subsidize its activities by compensating

"volunteer" staff.

If this check is removed, there is no question that severe injury to competition and innovative technology will occur.

CONCLUSION

For all of the above this amicus curiae respectfully urges that this Court affirm the decision of the United States Court of Appeals For The Second Circuit on the issue and theory of liability of the ASME to Hydrolevel Corporation. Or, in the alternative, if this Court is convinced that the particular facts in this particular case do not support a decision in favor of Hydrolevel, that the principles articulated in this brief not be brushed aside and the Court, in its wisdom, add such words as necessary in its decision so that an abusive power of the type alleged by Hydrolevel and spoken

to by this amicus curiae have some method of redress. For by reversing Hydrolevel, even if said reversal is only on the facts and not the law, and the Court thereby does not reach the issue of liability under the facts as found by the Second Circuit, a grave injustice will be done and the matter will rise again to be adjudicated by the Courts of the land.

Respectfully submitted,

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A P P E N D I X

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INTRODUCTION TO APPENDIX

As previously pointed out I gave testimony before the Federal Trade Commission concerning the wisdom of their proposed regulation of the private standards-making groups. The entire transcript of my testimony and of the examination by Mr. William Rockwell, of the American National Standards Institute, is available from the Federal Trade Commission and, if desired by the Court, a transcript would be made available upon request. I have, therefore, elected not to go to the great expense of having the transcript retyped in the format required by this Court and rather will reproduce here several of the salient comments that I think speak to the heart of the instant issue.

On Page 10432 of the transcript I was addressing the commission and commen-

ting on the fact that there had been serious failures in many of our competitor's emergency beacons and that approximately one-third of them had been withdrawn from the market and there were many planes flying without the protection of these emergency SOS transmitters. Specifically, on that page, I said:

> "We haven't had that problem with our design and yet now we are being precluded from the marketplace by virtue of a new standard that is being generated which specifically outlaws a number of the features that have directly contributed to our excellent record of doing the intended job. The standards in this case are promulgated by RTCA, Radio Technical Commission for Aeronautics. RTCA is a private standards group that has participants from industry, government and the international community, and although the standards developed by RTCA are not law in themselves, RTCA has a special advisory status with the Federal Aviation Administration and the reality is that their standards are generally adopted virtually verbatim."

I then proceeded to detail some of my experiences with RTCA and referring to page 10434, I commented:

> "When the original RTCA committee met back in 1972 I was a very active participant on the committee and I pointed out several areas where I saw that there would be future problems; these being the antenna, the amount of power required, and the forces required to activate the beacon in the event of a crash. Because of the nature of RTCA, my ideas and those of the people that supported me were not adopted. We were a minority opinion and in the grinding pressure to achieve a consensus opinion I feel unwise compromises were made. I also noted that they tended to occur at the end of a session on a Friday afternoon. But the most critical problem was that once adopted there was no appeals mechanism for minority opinion. Indeed, the positions adopted were often less based on good fact or evidence but rather on the tenacity of a few that molded the consensus and often, and I maintain those three instances that I've indicated here, history has shown that the best set of standards did not come about. In brief, the adoption of those standards resulted in many beacons not functioning

> when there were crashes. They failed because the power requirements were set at a level 25 times higher than that recommended by the granddaddy of all standards organization, the National Bureau of Standards."

Needless to say, should this Honorable Court affirm the Second Circuit, it is my belief that the pressure that would be brought to bear on the private standards organizations from the standpoint of potential negligent liability would force standards to be more closely connected to the salient factors determining product safety than on the economic interests of a few, as unfortunately has been the case many times in these organizations.

Even the threat of the Federal Trade Commission being a "court" of last resort to prevent abuses of a standards organization seemed to work, at least in my case. In returning to

the transcript and quoting from page 10436,

> "I believe that the mere fact that this legislation is being proposed enables me now to be in the position where this private developer of standards now finds that his standard does not exclude my beacon. In all fairness, and I must point out that the final word does indeed rest with the FAA, when previously RTCA outlawed our antenna we went to the FAA and at great expense and a great effort proved to the FAA that our antenna system was acceptable and that the FAA granted us a special waiver and on the strength of that waiver we were able to legally produce these beacons. But because we never fully complied with the standards developed by RTCA, the major manufacturers, Piper, Beech, Cessna, the people that make the vast majority of the small planes, never adopted our beacon. After all, why take a beacon that doesn't meet the standards and is legal by virtue of a waiver when you can have the real thing?

Obviously, in some industries, that type of pressure is either not usually within the capability of the small firm.

Similarly, in Hydrolevel's case, boiler manufacturers and other major potential customers of Hydrolevel were not convinced that the Hydrolevel device worked even after the retraction letter published by ASME. Such is the power of the standards groups.

When the subject of the proposed regulation by the Federal Trade Commission was brought up, RTCA reacted much in the manner of the other private standards groups that have made their views known in the amici curiae briefs submitted to this Court. That is to say they claim that any sort of regulation, responsibility or due process would cause their entire organization to fall into bankruptcy. That came up on page 10442, where I was questioned by Mr. Bruce Silverglade of the Federal Trade Commission and quoting there, Mr. Silverglade said,

"My other question concerns page 17 of your statement. There you state that you were invited to the office of Mr. William Fuchs, and he told you that he was in charge of RTCA's response to the FTC's proposed rulemaking. And you state that he was very upset and said that the proposed rule would bankrupt their standards organization."

and on page 10443, I quote my response,

"No, he didn't. It was generalities, and I think probably, in all fairness, that was the heat of emotion. And I feel I have to point this out. There has been a substantial change that I have noticed in RTCA at the last meeting. We are now, instead of voting by consensus, we are going out now -- the FAA funded NASA to do studies on some of these areas, and we are taking a look at these studies and putting in hard evidence. I don't know whether this was a slip of the tongue, but at that meeting somebody said hypothetically if we had a deadlock and no clear majority, the executive committee would be the appeals board. So I think RTCA, who I think sincerely wants to do the right thing, is already starting to implement some of these things, and I suspect at very negligible cost."

My purpose in drawing the Court's atten-

tion to this statement is that it takes very little pressure to have the standards organizations become responsible for the awesome power that can emanate from them. Such mechanisms as having appeals boards, executive committees, issuing minority reports, etc., are simple and easy and the failure to do this, in addition to allowing the standards committee to espouse a standard that effectively excludes several manufacturers from the marketplace is, I believe, unquestionably an act of negligent liability and one for which the standards organization should be responsible.

I think that one of the most important aspects of the position espoused by the various standards amici curiae briefs was the fact that any sort of regulation or responsibility would be terribly burdensome and when

faced with the possibility of Federal Trade Commission intervention, ASME through Mr. Rockwell, I think put the issue in prospective when on page 10461 he said,

> "Let me ask you one other question. Concerning the rule itself, you understand that this rule imposes upon all standards groups a very heavy regulatory authority, a lot of rules and regulations. And would you accept, instead of that, perhaps a good appeals mechanism by an appropriate group, whether it be the Department of Commerce or American National Standards Institute? If that could be set up in lieu of heavy government regulation, would you consider that?"

to which I replied,

> "In general, yes. I am one of these people that believe the less regulation we have, the better. I believe abolishing the CAB is a way to have lower air fares and increase competition. But what you need is some mechanism where if the standards committee isn't responsive, that it has to say why, and if you disagree with the why you have to go to an impartial agency someplace. A lot of other things perhaps

are not necessary, but that is my feeling."

whereas Mr. Rockwell responded,

"Thank you very much. Those are the only questions I have."

As previously emphasized, the proposed stop-gap of the Federal Trade Commission doesn't exist. Indeed, in checking with the Federal Trade Commission it seems that the precise situation with regard to regulation is very hazy but the people I spoke to generally agreed that it was apparent that Congress intended to discourage the FTC from moving in this regard to regulate the private standards groups and wanted to encourage private antitrust actions. There was also agreement that should the Supreme Court reverse on the principles espoused by Second Circuit in Hydrolevel there would well be no avenue of redress at all.

EXCERPTS FROM DEMOCRACY IN AMERICA
by Alexis de Tocqueville
Edited by Richard D. Heffner

"29. OF THE USE WHICH THE AMERICANS MAKE OF PUBLIC ASSOCIATIONS IN CIVIL LIFE

I do not propose to speak of those political associations by the aid of which men endeavor to defend themselves against the aggressions of regal power. That subject I have already treated. If each citizen did not learn, in proportion as he individually becomes more feeble, and consequently more incapable of preserving his freedom single-handed, to combine with his fellow-citizens for the purpose of defending it, it is clear that tyranny would unavoidably increase together with equality.

Those associations only which are formed in civil life, without reference

to political objects, are here adverted to. The political associations which exist in the United States are only a single feature in the midst of the immense assemblage of associations in that country. Americans of all ages, all conditions, and all dispositions, constantly form associations. They have not only commercial and manufacturing companies, in which all take part, but associations of a thousand other kinds, --religious, moral, serious, futule, general or restricted, enormous or diminutive. The Americans make associations to give entertainments, to found seminaries, to build inns, to construct churches, to diffuse books to send missionaries to the antipodes; they found in this manner hospitals, prisons,

and schools. If it be proposed to inculcate some truth, or to foster some feeling by the encouragement of a great example, they form a society. Wherever, at the head of some new undertaking, you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.

I met with several kinds of associations in America of which I confess I had no previous notion; and I have often admired the extreme skill with which the inhabitants of the United States succeed in proposing a common object to the exertions of a great many men, and in inducing them voluntarily to pursue it.

I have since travelled over England, whence the Americans have taken some

of their laws and many of their customs; and it seemed to me that the principle of association was by no means so constantly or adroitly used in that country. The English often perform great things singly, whereas the Americans form associations for the smallest undertakings. It is evident that the former people consider association as a powerful means of action, but the latter seem to regard it as the only means they have of acting.

Thus, the most democratic country on the face of the earth is that in which men have, in our time, carried to the highest perfection the art of pursuing in common the object of their common desires, and have applied this new science to the greatest number of purposes. Is this the result of accident? or is there in reality any necessary connection between the principle of associa-

tion and that of equality?

Aristocratic communities always contain, amongst a multitude of persons who by themselves are powerless, a small number of powerful and wealthy citizens, each of whom can achieve great undertakings single-handed. In aristocratic societies, men do not need to combine in order to act, because they are strongly held together. Every wealthy and powerful citizen constitutes the head of a permanent and compulsory association, composed of all those who are dependent upon him, or whom he makes subservient to the execution of his designs.

Amongst democratic nations, on the contrary, all the citizens are independent and feeble; they can do hardly

anything by themselves, and none of them can oblige his fellow-men to lend him their assistance. They all, therefore, become powerless, if they do not learn voluntarily to help each other. If men living in democratic countries had no right and no inclination to associate for political purposes, their independence would be in great jeopardy; but they might long preserve their wealth and their cultivation: whereas, if they never acquired the habit of forming associations in ordinary life, civilization itself would be endangered. A people amongst whom individuals should lose the power of achieving great things single-handed, without acquiring the means of producing them by united exertions, would

soon relapse into barbarism.

Unhappily, the same social condition which renders associations so necessary to democratic nations, renders their formation more difficult amongst those nations than amongst all other. When several members of an aristocracy agree to combine, they easily succeed in doing so: as each of them brings great strength to the partnership, the number of its members may be very limited; and when the members of an association are limited in number, they may easily become mutually acquainted, understand each other, and establish fixed regulations. The same opportunities do not occur amongst democratic nations, where the associated members must always be very numerous for their association to have any power.

I am aware that many of my countrymen are not in the least embarrassed by this difficulty. They contend, that, the more enfeebled and incompetent the citizens become, the more able and active the government ought to be rendered, in order that society at large may execute what individuals can no longer accomplish. They believe this answers the whole difficulty, but I think they are mistaken.

A government might perform the part of some of the largest American companies; and several States, members of the Union, have already attempted it; but what political power could ever carry on the vast multitude of lesser undertakings which the American citizens perform every day, with the

assistance of the principle of association? It is easy to foresee that the time is drawing near when man will be less and less able to produce, of himself alone, the commonest necessaries of life. The task of the governing power will therefore perpetually increase, and its very efforts will extend it every day. The more it stands in the place of associations, the more will individuals, losing the notion of combining together, require its assistance: these are causes and effects which unceasingly create each other. Will the administration of the country ultimately assume the management of all the manufactures which no single citizen is able to carry on? And if a time at length arrives when, in consequence of the extreme subdivision of landed property,

the soil is split into an infinite number of parcels, so that it can only be cultivated by companies of husbandmen, will it be necessary that the head of the government should leave the helm of state to follow the plough? The morals and the intelligence of a democratic people would be as much endangered as its business and manufactures, if the government ever wholly usurped the place of private companies.

Feelings and opinions are recruited, the heart is enlarged, and the human mind is developed, only by the reciprocal influence of men upon each other. I have shown that these influences are almost null in democratic countries; they must therefore be artificially created, and this can only be accomplished by associations."

EXCERPTS FROM EDITORIAL
"IS THERE NO LIMIT TO IEEE'S ARROGANCE?

by Roy Forsberg
Editorial Director

"Because of IEEE's apparent unwillingness over the years to represent the best interests of the bulk of its membership--working engineers--many of its members have dropped their affiliation. Additionally, many other engineers have refused to join at all. However, "unwillingness" (translate to "unresponsiveness") might be too kind in describing the Board of Directors's latest move. "Arrogant" is closer to the mark.

Once again, without consulting IEEE's membership, the Board has taken an action that appears to be self serving and ill advised. In the name of IEEE, it has filed a brief with the US Supreme Court supporting the contention of ASME (the

American Society of Mechanical Engineers) that engineering societies should be exempt from the Sherman Anti-Trust Act.

ASME's appeal to the Supreme Court stems from a lower court's ruling that ASME members conspired with a manufacturer of boiler safety equipment when they met with that manufacturer and then issued a statement on ASME letterhead implying that another manufacturer's safety device did not meet ASME's boiler-code regulations. In reality, the device did meet the regulations. The second company claimed that this letter affected sales, forcing it to go out of business. The court agreed and awarded the firm $9.9 million in the resulting suit against ASME.

The basis for ASME's appeal and

IEEE's brief is that the society's committees consist of volunteers who should not be held accountable for their actions in the name of ASME. IEEE contends, "Indeed, a rule of strict liability may herald the curtailment of beneficial professional society programs in any case where organizational procedures theoretically may be abused by volunteer members for individual commercial advantage. In a large society such as IEEE, a significant number of such programs may be jeopardized, in spite of the existence of reasonable, workable procedural controls, because of the impossibility of policing all society members' conduct."

EDN believes that this position is a foul-smelling smokescreen. The fact that

committee members are volunteers should have no bearing on their accountability. They can do the same amount of harm (or good) whether they're paid or not. And if a society accepts the responsibility of setting industry standards and/or regulations, it must be willing to be held accountable for its actions and the actions of the members it appoints to key committees.

IEEE's Board consists of company executives and academics. It has rarely been accused of taking stands that benefit the membership when such stands conflict with its members' interests. The Board's actions have remained true to form in this case.

EDN urges IEEE to withdraw its brief. The engineering profession

will never attain the respect and stature it strives for if it refuses to be held responsible and accountable for its actions."

Roy Forsberg
Editorial Director

EDN September 16, 1981